SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1939

No. 804

THE SUNSHINE ANTHRACITE COAL COMPANY,
Appellant,

vs.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ARKANSAS.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS.

STATEMENT AS TO JURISDICTION.

HENRY ADAMSON,
GEORGE O. PATTERSON,
Counsel for Appellant.

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IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DIVISION OF ARKANSAS. WESTERN DIVISION

Equity Action No. 2949.

THE SUNSHINE ANTHRACITE COAL COMPANY,
Plaintiff,

vs.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ARKANSAS.
Defendant.

Before the Honorables, Joseph W. Woodrough, Circuit Judge; Thomas C. Trimble and Harry J. Lemley, District Judges, Composing the Court Consisting of Three Judges Under Section 380(a) of Title 28 of the United States Code Annotated (Act of August 24, 1937, Chapter 754, 50 Statutes 751).

STATEMENT AS TO JURISDICTION.

The jurisdiction of the Supreme Court of the United States upon appeal is invoked under Section 3 of the Act of August 24, 1937, Chapter 754, 50 Statutes 751 (United States Code Annotated, Title 28, Section 380 (a)). The final decree of the three-judge District Court was entered February 16, 1940. Application for appeal is herewith pre-

sented on the 4th day of March, 1940. The Act of Congress, the validity and construction of which is involved, is the Bituminous Coal Act of 1937, approved April 26, 1937; c. 127, 50 Statutes 72 (United States Code Annotated, Title 15, Section 828 to Section 851, inclusive).

The general purpose of the Bituminous Coal Act of 1937 was to stabilize the bituminous coal industry. Section 1 is a statement of the purposes of the act. Section 2 establishes the National Bituminous Coal Commission and prescribes its powers and duties, and contains, among other provisions, the following:

> "Such Commission shall have power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this act, and shall annually make full report of its activities to the Secretary of the Interior for transmission to Congress. A majority of the Commission shall constitute a quorum for the transaction of business, and a vacancy in the Commission shall not impair the right of the remaining members to exercise all the power of the Commission. No order which is subject to judicial review under Section 6, and no rule or regulation which has the force or effect of law, shall be made or prescribed by the Commission, unless it has given reasonable public notice of a hearing, and unless it has afforded to interested parties an opportunity to be heard, and unless it has made findings of fact. Such findings, if supported by substantial evidence, shall be conclusive upon review thereof by any court of the United States."

(The President, by his Reorganization Plan No. 2 as of July 1, 1939, abolished the National Bituminous Coal Commission and transferred all of its powers, duties and functions to the Secretary of the Interior, to be administered under his direction and supervision by such division, bureau or office in the Department of the Interior as the Secretary might determine.) This section also provides for the ap-

pointment of a Consumers' Counsel and fixes its powers and duties. Section 3 of the Act is designated "Tax on Coal" and in paragraph (a) of Section 3 imposes a tax of one cent per ton of two thousand pounds on the sale or other disposal of bituminous coal. Section 3 of the Act then proceeds as follows:

> (b) In addition to the tax imposed by subsection (a) of this section, there is hereby imposed upon the sale or other disposal of bituminous coal produced within the United States, when sold or otherwise disposed of by the producer thereof, which would be subject to the application of the conditions and provisions of the code provided for in section 4, or of the provisions of section 4-A, an excise tax in an amount equal to 19½ per centum of the sale price at the mine in the case of coal disposed of by sale at the mine, or in the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, 19½ per centum of the fair market value of such coal at the time of such disposal or sale. In the case of any producer who is a code member as provided in section 4 and is so certified to the Commissioner of Internal Revenue by the Commission, the sale or disposal by such producer during the continuance of his membership in the code of coal produced by him shall be exempt from the tax imposed by this subsection.
>
> (c) The taxes imposed by this section shall be paid to the United States by the producer, and shall be payable monthly for each calendar month on or before the first business day of the second succeeding month, under such regulations and in such manner as shall be prescribed by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury.
>
> (d) In the case of coal disposed of otherwise than by sale at the mine, and coal sold otherwise than through an arms' length transaction, the Commissioner of

Internal Revenue shall determine the market value thereof. Such market value shall equal the current market price at the mine of coal of a comparable kind, quality, and size produced for market in the locality where the coal so disposed of is produced.

(e) The tax imposed by subsection (a) of this section shall not apply in the case of a sale of coal for the exclusive use of the United States or of any State or Territory of the United States or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions. Under regulations prescribed by the Commissioner of Internal Revenue with the approval of the Secretary of the Treasury, a credit against the tax imposed by subsection (a) of this section or a refund may be allowed or made to any producer of coal in the amount of such tax paid with respect to the sale of coal to any vendee, if the producer has in his possession such evidence as the regulations may prescribe that such coal was resold by any person for the exclusive use of the United States or of any State, Territory of the United States, or the District of Columbia, or any political subdivision of any of them, for use in the performance of governmental functions.

(f) No producer shall, by reason of his acceptance of the code provided for in section 4, or of the exemption from the tax provided in subsection (b) in this section, be held to be precluded or estopped from contesting the constitutionality of any provision of this Act or of the code, or the validity or application of either to him or to any part of the coal produced by him.

Section 4 of the Act is designated "Bituminous Coal Code," and the first three paragraphs of said section read as follows:

SEC. 4. The provisions of this section shall be promulgated by the Commission as the "Bituminous Coal Code", and are herein referred to as the code.

Producers accepting membership in the code as provided in section 5 (a) shall be, and are herein referred to as, code members, and the provisions of such code shall apply only to such code members, except as otherwise provided by subsection (h) of part II of this section.

For the purpose of carrying out the declared policy of this Act, the code shall contain the following conditions and provisions, which are intended to regulate interstate commerce in bituminous coal and which shall be applicable only to matters and transactions in or directly affecting interstate commerce in bituminous coal.

Section 4, Part I is designated "Organization", and provides method for organization of district boards and prescribes district boards' powers and duties. Section 4, Part II is designated "Marketing", and confers upon the Commission the power and authority "to prescribe for code members minimum and maximum prices and marketing rules and regulations, as follows:" Then follow detailed provisions for proposing, determining, coordinating and establishing minimum prices by the Commission; section 4 II (i) is designated "Unfair Methods of Competition", and contains numerous practices declared to be unfair methods of competition in violation of the code. Section 4-A reads as follows:

"Whenever the Commission upon investigation instituted upon its own motion or upon petition of any code member, district board, State or political subdivision thereof, or the consumers' counsel, after hearing finds that transactions in coal in intrastate commerce by any person or in any locality cause any undue or unreasonable advantage, preference, or prejudice as between persons and localities in such commerce on the one hand and interstate commerce in coal on the other hand, or any undue, unreasonable, or unjust discrimination against interstate commerce in coal, or in any manner directly affect interstate commerce in

coal, the Commission shall by order so declare and thereafter coal sold, delivered or offered for sale in such intrastate commerce shall be subject to the provisions of section 4.

Any producer believing that any commerce in coal is not subject to the provisions of section 4 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by section 4 with respect to the commerce covered by the application until such time as the Commission shall act upon the application. If the Commission has reason to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the Act with respect to commerce in coal properly subject to the provisions of section 4 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 6."

Section 5 provides for acceptance of membership in the code, provides for filing of charges, hearing on the charges

and revocation of membership in the code and provides a method of application for reinstatement of any member whose membership has been revoked, and confers upon any code member right of action for injury to his business or property by any other code member. Section 6(a) provides for review of all rules, regulations, determinations and promulgations of any district board by the Commission, upon appeal. Section 6(b) provides as follows:

"Any person aggrieved by an order issued by the Commission in a proceeding to which such person is a party may obtain a review of such order in the Circuit Court of Appeals of the United States, within any circuit wherein such person resides or has his principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the entry of such order, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall be forthwith served upon any member of the Commission and thereupon the Commission shall certify and file in the court a transcript of the record upon which the order complained of was entered. Upon the filing of such transcript such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged below. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the hearing before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Com-

mission may modify its findings as to the facts, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, and enforcing or setting aside, in whole or in part, any such order of the Commission shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U. S. C., title 28, secs. 346 and 347).

"The commencement of proceedings under this subsection shall not, unless specifically ordered by the court, operate as a stay of the Commission's order."

Section 6(c) provides for enforcement of any order of the Board against the code member by application to the Circuit Court of Appeals of the United States within any circuit where such code member resides or carries on business, and section 6(d) provides that the jurisdiction of the Circuit Court of Appeals of the United States, or of the United States Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside or modify orders of the Commission shall be exclusive.

Section 7 provides for the applicability, so far as applicable and not inconsistent with the provisions of this act, of all other provisions of law, including penalties and refunds applicable in respect to the taxes imposed by Title 4 of the Revenue Act of 1932.

Section 8 authorizes administering oaths to witnesses, issuing subpoenas, and subpoenas *duces tecum* and other powers in connection with hearings and investigations.

Section 9 is a declaration of public policy with reference to collective bargaining.

Section 10 authorizes the Commission to require reports from producers and confers other general powers on the Commission.

Section 11 provides that State laws regulating mining of coal not inconsistent herewith are not affected by the act.

Section 12 provides for the creation of marketing agencies under the supervision of the National Bituminous Coal Commission.

Section 13 declares the intention that if any provision of the act or code or any section, subsection, paragraph or proviso is held invalid, the remainder of the act or code shall not be affected thereby.

Section 14 is designated "Other Duties of the Commission" and authorizes the Commission to study and investigate and report to the Secretary of the Interior for transmission by him to Congress, certain matters in connection with the coal industry.

Section 15 authorizes the correction of abuses that may grow up in connection with the code.

Section 16 authorizes the Commission or the office of the Consumers' Counsel to make complaint to the Interstate Commerce Commission with respect to rights, charges, tariffs and practices relating to transportation of coal.

Section 17 is the definition section of said Act, and reads as follows:

Sec. 17. As used in this Act—

(a) The term "coal" means bituminous coal.

(b) The term "bituminous coal" includes all bituminous, semi-bituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less

than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more.

(c) The term "producer" includes all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal.

(d) The term "interstate commerce" means commerce among the several States and Territories, with foreign nations, and with the District of Columbia.

(e) The term "United States" when used in a geographical sense includes only the States, the Territories of Alaska and Hawaii, and the District of Columbia.

Section 18 fixes the effective date of the Act.

Section 19 fixes the expiration of the statute.

Section 20 is the repealing section and repeals the Bituminous Coal Conservation Act of 1935, appropriates money for the expense of the Board and the Consumers' Counsel, transfers the property of the National Bituminous Coal Commission and Consumers' Counsel established under the Consumers' Coal Conservation Act of 1935, to the Commission and the Consumers' Counsel established under this Act.

Section 21 provides that this act may be cited as "The Bituminous Coal Act of 1937". There then follows an annex to the act, being a schedule of districts dividing the United States into twenty-three districts.

Plaintiff, The Sunshine Anthracite Coal Company, is a corporation engaged in the business of producing and marketing coal from its mine in the Spadra coal field in Johnson County, Arkansas, and has never subscribed to nor accepted the provisions of the Bituminous Coal Code provided for in Section 4 of the Bituminous Coal Act of April 26, 1937, c. 127-75th Congress, first session, 50 Statutes, 72 et seq. (15 U. S. C. A. section 828 et seq.) On May 3,

1938, defendant herein served notice and demand on plaintiff for taxes in the amount of $14,748.64 and on May 5, 1938, filed in the office of the Circuit Court and Recorder of Johnson County, Clarksville, Arkansas, notice of tax lien under the Internal Revenue laws in the total amount of $15,488.62; that plaintiff on May 9, 1938, filed its bill of complaint against the defendant herein, praying for a temporary injunction suspending and restraining the assessing and collecting or attempting to assess and collect both the one cent per ton tax and the so-called 19½ per cent excise tax, and praying that upon final hearing a permanent injunction of like effect be issued and granted against the defendant.

The application for temporary injunction as well as the prayer for permanent injunction was based upon three contentions:

1. That the coal produced and marketed by the plaintiff was anthracite coal and not within the purview of the Bituminous Coal Act of 1937.

2. That the so-called 19½% tax levied by section 3 (b) of the Act was, by the terms of the act itself, applicable to code members only.

3. That said act was invalid and void in that it constitutes an unwarranted delegation of the legislative functions of the Congress of the United States; that it deprives plaintiff of its property without due process of law, in violation of the 5th amendment of the Constitution of the United States; that it constitutes an invasion by the government of the United States of America of rights and powers reserved to the several states by the 10th amendment to the Constitution of the United States; that the so-called 19½% tax is not a good faith exercise of the taxing power conferred upon Congress by Clause 1 of Section 8, Article 1 of the Constitution of the United States; that the classi-

fication is arbitrary and unreasonable; that the act attempts to levy an excise tax in violation of Article 1, Clause 1 of the Constitution of the United States, and that it is beyond the power of Congress to legislate on the business of producing and selling of bituminous coal as the business is a private one and not affected with the public interest; that on June 3, 1938, before a properly constituted three-judge statutory court, hearing on temporary injunction was held and temporary injunction issued restraining the assessment and collection or attempt to collect the taxes levied under section 3(b) of the Bituminous Coal Act of 1937. The defendant by his answer and on the trial, insisted that the enactment of the Bituminous Coal Act of 1937 was a proper exercise of the powers of Congress; that it was neither arbitrary, unreasonable nor capricious, and that it was in all respects a valid and constitutional enactment and was applicable to coal produced by this plaintiff, and that the 19½ per cent tax levied by section 3(b) was applicable to the coal produced by this plaintiff. Defendant also set up as an answer in bar on the question of whether or not plaintiff's coal came within the purview of the statute, proceedings, findings and order or decree entered on hearing of petition for exemption and general investigation of coals in the Sprada coal field, Johnson County, Arkansas, had and held before the National Bituminous Coal Commission determining that coal produced by plaintiff and by all producers in the Sprada field was bituminous coal within the meaning of the act; plaintiff filed a motion to strike out all of that portion of the answer setting up and alleging the above proceedings as an answer in bar, which said motion to strike was overruled by the three-judge court, and the court in an opinion filed at that time, copy of which is hereto appended, held that the proceedings before the National Bituminous Coal Commission

were conclusive on this Court in this hearing, and denied plaintiff's right to a trial *de novo* on such question.

Final hearing on the merits for permanent injunction was had and held at Little Rock, Arkansas, before the Honorables Joseph W. Woodrough, Circuit Judge, Thomas C. Trimble and Harry J. Lemley, District Judges; that said final hearing of said three-judge court excluded all evidence offered by plaintiff as to nature of characteristics of plaintiff's coal, technical meaning and prior construction by other departments and former coal commissions of the words "bituminous", "semi-bituminous" and "sub-bituminous", and denied plaintiff's right to trial *de novo* both as to nature or characteristics of plaintiff's coal and technical meaning and prior construction by other departments and the former coal commission of the words "bituminous", "semi-bituminous" and "sub-bituminous" coal; on February 16, 1940, fiual decree was entered in said cause as follows:

> "This cause having been assigned for trial on February 15, 1940, trial was had, evidence heard and arguments of counsel presented, and the Court now files herein its findings of fact and conclusions of law thereon, and the Court now renders judgment as follows:
>
> It is hereby ordered; adjudged and decreed that the defendant be and he is hereby permanently enjoined from collecting or attempting to collect taxes and penalties laid and accrued against plaintiff by defendant under Section 3(b) of the Bituminous Coal Act of 1937, same being the tax of 19½ per centum of the sale price of plaintiff's coal, up to and including date of December 4, 1939.
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> It is further ordered, adjudged and decreed that as to taxes accrued or assessed against plaintiff under Section 3(b) of said Act from and after date of December 4, 1939, plaintiff's bill is without equity and the same is hereby dismissed.

It is further ordered, adjudged and decreed by the Court that notwithstanding the dismissal of said bill, the restraining order heretofore issued against defendant restraining him from collecting or attempting to collect taxes asserted against plaintiff under Section 3(b) of said Bituminous Coal Act of 1937, be and the same is hereby continued in full force and effect as to such taxes assessed and accruing from and after December 4, 1939, for the period of thirty (30) days from entry of this decree to enable plaintiff to appeal to the Supreme Court of the United States, and that if such appeal shall be perfected within said thirty (30) day period, said restraining order against the defendant shall remain in full force and effect until final disposition of said appeal by said Supreme Court of the United States; otherwise, it shall cease to be operative and shall stand revoked at the end of said thirty (30) day period.

Signed and dated at Little Rock, Arkansas, this 16th day of February, 1940."

And upon the filing of its final decree the three-judge court also filed its findings of fact and stated therein its conclusions of law as follows:

"Conclusions of Law.

1. This case involves a controversy arising under the Constitution and laws of the United States. The amount in controversy exceeds the sum of $3,000 exclusive of interest and costs.

2. This Court has jurisdiction as a court of equity.

3. This Court has no jurisdiction to determine whether plaintiff's coal is "bituminous coal" as defined by the Bituminous Coal Act of 1937. Under Section 4-A and Section 6 of the Act, the findings and order of the National Bituminous Coal Commission declaring plaintiff's coal to be "bituminous coal" within the meaning of the Act was an order which the Commission had

jurisdiction to make, and which can be reviewed only by a Circuit Court of Appeals.

4. In any event, the issue whether plaintiff's coal is "bituminous coal" as defined by the Act has already been conclusively determined against plaintiff by a former proceeding in which the National Bituminous Coal Commission denied plaintiff's application for exemption from the Act. The Circuit Court of Appeals affirmed the Commission's order, and the Supreme Court denied a writ of certiorari.

5. Section 3(b) of the Act imposes a tax upon producers of bituminous coal in interstate commerce who do not subscribe to the Bituminous Coal Code.

6. The Bituminous Coal Act of 1937, C. 127, 75th Congress, 1st Session, 50 Stat. 72, is constitutional:

(a) The regulatory provisions in Section 4 are a valid exercise of the power of Congress to regulate interstate commerce and intrastate commerce directly affecting interstate commerce.

(b) The establishment of prices for bituminous coal sold in interstate commerce or intrastate commerce directly affecting interstate commerce is reasonable as is related to a proper Congressional purpose and does not violate the Fifth Amendment.

(c) The standards of the Act are sufficiently definite and the Act contains no invalid delegation of legislative authority.

(d) Whether or not the taxing provisions of Section 3(b) could be otherwise sustained, since the regulatory provisions of the Act are valid, the taxing provisions of the Act are likewise valid as affecting the valid regulatory purpose of the Act.

(e) The exemption from the tax imposed by Section 3(b) of the producers who subscribe to the Bituminous Coal Code, and are subject to the regulatory provisions of Section 4, does not constitute an arbitrary classification contravening the Fifth Amendment.

7. The bill of complaint should be dismissed."

Appeal prayed for is to the Supreme Court of the United States from the final decree dismissing plaintiff's bill of complaint, and is provided for by the Act of 1937, c. 127, 50 Statutes 72 (United States Code Annotated, Title 28, Section 380(a). Case believed to sustain the jurisdiction of the Supreme Court of the United States is, *William Jameson & Company, Inc.* v. *Henry Morgenthau, Jr., Secretary of the Treasury of the United States, et al.*, 307 U. S. 171.

Respectfully submitted,

HENRY ADAMSON,
GEORGE O. PATTERSON,
Attorneys for Plaintiff.

Copy of decision of C. C. A. 8, in case of *Sunshine Anthracite Coal Company* v. *National Bituminous Coal Commission*, 105 F. (2d) 559 is appended to original.

EXHIBIT "A".

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION.

EQUITY ACTION No. 2949.

THE SUNSHINE ANTHRACITE COAL COMPANY,
Plaintiff,

vs.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ARKANSAS,
Defendant.

Before WOODROUGH, Circuit Judge, and TRIMBLE and LEMLEY, District Judges.

Opinion Overruling Plaintiff's Motion to Strike Parts of Answer and Supplementary Answer.

This case has been submitted to the three-judge court on the motion of the plaintiff to strike out those parts of the defendant's answer and supplemental answer which set forth the proceedings of the National Bituminous Coal Commission in which it was determined by the Commission that the underlying coal in certain counties of Arkansas, including the coal produced by the plaintiff, is bituminous coal within the meaning of the Bituminous Coal Act of April

26, 1937, 15 U. S. C. S. Sec. 828 et seq. and that the plaintiff is not entitled to exemption from the operation and effect of the Act and the subsequent proceedings on the appeal from such determination to this Court, reported in 105 F. (2d) 559, and the application for and denial of certiorari by the Supreme Court November 6, 1939. The plaintiff's petition has been amended so as to include expended allegations to the effect that the coal produced by it is not bituminous coal within the meaning of Section 17 (b) of the Act, and in support of its motion it presents that it is entitled in this suit to have this Court consider its evidence in support of these allegations and render its own judgment upon the issues joined thereon. Its position is that this Court is not finally bound by the determination of the Commission or the decision of the Court of Appeals on the review in that court to find as a fact that plaintiff's coal is bituminous coal within the meaning of the Act.

This suit is in equity against the Collector of Internal Revenue to enjoin him from collecting from the plaintiff the "tax" of 19½ per cent upon gross sales of its coal production, imposed by Section 3 of the Act against producers of bituminous coal moving in interstate commerce who do not become members of the Code. The suit is independent of the proceedings before the Commission and the appeal in the Circuit Court of Appeals, and it is an appropriate suit to test the validity as to the plaintiff of the imposition upon it of the "tax" of 19½ per cent upon its gross sales of coal. In considering and passing upon the present motion therefore this Court will confine itself entirely to the question whether or not the status of the plaintiff as a producer of bituminous coal within the definition of Section 17 of the Act has been finally settled against the plaintiff by the determination and decisions pleaded by defendant.

This Court's jurisdiction is that of a District Court and it is bound to follow unreversed and unmodified decision by the Circuit Court of Appeals of the circuit. When we turn to that court's opinion in Sunshine Anthracite Coal Company *v.* National Bituminous Coal Commission, we note the court's conclusion was that Congress had delegated to the Commission the jurisdiction to determine for all ad-

ministrative purposes of the Act, what coals were and what coals were not within the definitions and purview of the Act.

The issue of the Commission's jurisdiction was squarely presented by the petitioner for review which is the party plaintiff in this case, and was directly passed on and decided by the court. It was contended "that the jurisdiction of the National Bituminous Coal Commission in fixing maximum and minimum prices, rules and regulations, is limited by the Act to coal producers who have accepted the code, and that as petitioner has not become a code member the Commission is given no power to hold a hearing and determine the class or kind of coal produced from petitioner's mines." It argues that "whether or not the coal it produces is bituminous, anthracite, semi-anthracite, lignitic or what not, is of no interest to the Commission until such time as the producer applies for membership in the code."

In answer to that contention "the Commission has rested its jurisdiction to determine whether petitioner's coal is bituminous within the meaning of the Act upon two separate and distinct bases: (1) Upon the general power of the Commission to make all reasonable rules and regulations for carrying out the provisions of the Act and (2) upon the power to grant exemptions under Section 4-A."

The court of Appeals decided the issue and said, "We, think the grounds of jurisdiction relied upon by the Commission are fully sustained." Further on in the opinion, the court said: "Here, where a determination of the character of coals in different parts of the country was a necessary incident to the performance of its other functions, the Commission was authorized to make the necessary determination." This court is bound to follow and apply the law so stated by the Circuit Court of Appeals.

But it is contended for the plaintiff, in support of the present motion, that its petition for review in the Circuit Court of Appeals was in an administrative proceeding in which such fact findings of the administrative body as were based upon substantial evidence were declared by the statute to be conclusive upon the court. The question whether plaintiff's coals are or are not bituminous is a

question of fact and plaintiff asserts a right to the independent judgment of the court as to the fact.

The answer to the contention is that the Bituminous Coal Act, in conferring powers upon the Coal Commission and prescribing the duties to be performed by it, has made the discharge of many of the Commission's duties dependent upon its first making determination of the character of the underlying coals throughout the country and of the resultant status of those who produce the coals and engage in interstate commerce therein. The determination of the character of the coals could have been made by the Congress itself, or it could delegate the power. By the terms of the Act it conferred jurisdiction on the Commission to make the determination and the procedure provided for and followed by the Commission accorded to the plaintiff a full and fair hearing and a review in the Circuit Court of Appeals which satisfied all constitutional requirements as to determination of the fact question of the plaintiff's status in respect to the administration of the Act. The nature of the fact question as it would arise in many different parts of the country practically necessitated delegation of the power to make determination to some such national body as the Coal Commission and precluded committings it to the outcome of individual law suits in many courts.

It has not been decided whether the Collector may constitutionally enforce the collection of the "tax" of 19½ per cent against the plaintiff as provided in Section 3 of the Act, but the decision of the Court of Appeals that the Commission had jurisdiction to determine, and that it had rightly determined the status of the plaintiff as a producer of bituminous coal, necessarily implied that the determination was final and conclusive in the present suit. The decision of the Supreme Court in *Shields* v. *Utah Idaho R. Co.*, 305 U. S. 177, permits of no other conclusion by this court.

In that case, the Utah Central Railroad Company sought to enjoin the United States District Attorney and the United States from enforcing against it certain penal statutes which were not applicable to interurban electric railways. The railroad company claimed to be exempt from the

operation of the statutes on the ground that it was an interurban electric railway, but in proceedings had before the Interstate Commerce Commission to which it was a party, the Commission determined that it was not. There had been no court review of the Commission's determination and the railroad company contended that it was entitled to the independent judgment of the court on the fact issue. The Circuit Court of Appeals in the Tenth Circuit, held that it was so entitled, but on appeal the Supreme Court said:

> "What is the scope of the judicial review to which respondent is entitled? As Congress had constitutional authority to enact the requirements of the Railway Labor Act looking to the settlement of industrial disputes between carriers engaged in interstate commerce and their employees, and could include or except interurban carriers as it saw fit, no constitutional question is presented calling for the application of our decisions with respect to a trial de novo so far as the character of the respondent is concerned. With respect to that question unlike the case presented in United States *v.* Idaho, 298 U. S. 105, where the Interstate Commerce Commission was denied the authority to determine the character of the trackage in question (Id. p. 107), the Commission in this instance was expressly directed to make the determination. As this authority was validly conferred upon the Commission, the question on judicial review would be simply whether the Commission had acted within its authority. Interstate Commerce Commission *v.* Union Pacific R. Co., 222 U. S. 541, 547; Interstate Commerce Commission *v.* Louisville & Nashville R. Co., 227 U. S. 88, 91; Virginia Railway Co. *v.* United States, 272 U. S. 658, 663; Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420, 444; Florida *v.* United States, 292 U. S. 1, 12; St. Joseph Stock Yards Co. *v.* United States, *supra*.
>
> "The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence

which it offered was received and considered. The sole remaining question would be whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious." Id.

It will be observed that the Supreme Court distinguished, as we must do here, between the fact question of character (or status) of the plaintiff in the suit for injunction which it had brought against the District Attorney, et al., and a question of constitutional right. We recognize fully that the plaintiff here, notwithstanding it is a producer of bituminous coal, has the right to contest payment of the 19½ per cent "tax" of Section 3 of the Act. Whether enforcement of that "tax" will or will not deprive it of constitutional rights remains to be litigated herein. But the Supreme Court has left no room to argue that this Court has jurisdiction to try *de novo* the fact question as to the status of the plaintiff under the Coal Act or the character of the coal it produces.

The Supreme Court's decision also precludes our reconsideration in this case of the evidence taken in the prior proceedings. That evidence was fully considered by the Circuit Court of Appeals and it was decided by that court that the Commission "in arriving at its determination had not departed from the applicable rules of law", and that "its findings had a basis in substantial evidence and were not arbitrary or capricious." Such is the full limit of judicial review of the fact findings of an administrative tribunal when made within the scope of its jurisdiction which the Supreme Court recognizes even in the absence of an express statute.

We think the Supreme Court's commitment to such support of administrative determinations of fact questions made within the powers lawfully delegated to them is also clearly shown in the other recent cases. *Rochester Telephone Co.* v. *United States*, 307 U. S. 125, 145; *Myers* v. *Bethlehem Shipbuilding Corp.*, 303 U. S. 41, 49; *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337.

The Bituminous Coal Act contains the express provision Section 6 (b) (d) that where a petition to a review is filed in a Circuit Court of Appeals, the Commission shall file therein a transcript of the record and thereupon "such court shall have exclusive jurisdiction to affirm, modify and enforce or set aside (the order reviewed) in whole or in part." Section 6 (d) provides:

> "(d) The jurisdiction of the Circuit Court of Appeals of the United States or the United States Circuit Court of Appeals for the District of Columbia, as the case may be, to enforce, set aside, or modify orders of the Commission shall be exclusive."

And in Section 6 (b), Congress provided that where a petition to review is filed in a Circuit Court of Appeals, the Commission shall file therein a transcript of the record, and thereupon "such court shall have exclusive jurisdiction to affirm, modify, and enforce or set aside such order, in whole or in part." The contentions of plaintiff that the fact question has not been settled against it either because its present action is an independent one or because there was a different object in the prior proceedings or because those proceedings were for limited purposes, cannot be sustained.

As to the parties. Another contention of the plaintiff in support of the present motion is that the parties to the present suit are not the same as in the former proceedings in that here the Collector of Internal Revenue is defendant and there the Coal Commission was respondent to the petition for review in the Circuit Court of Appeals.

In considering this contention it is observed that the powers conferred upon the Secretary of the Treasury and the Commissioner of Internal Revenue (and subordinately upon the Collector) in respect to the "tax" of Section 3 of the Bituminous Coal Act threatened to be enforced against plaintiff are dependent upon the determination of the plaintiff's status by the Commission and the Court of Appeals. The Commission and the Court are given the exclusive power to make that determination and have exercised the jurisdiction. The "tax", if any is due or

enforceable, is due to the United States. To the extent that the Commission has been entrusted with powers affecting the "tax" therefore, it is an agency of the United States, and to the extent that powers have been conferred upon the Collector and his superior officers, they are also agencies of the United States. It results from the paramount and sole interest of the United States that when a valid determination has been made between a party and an officer or agency of the United States in official capacity, it is conclusive between the party and any other of the government authorized as an agency of the government in respect to the same matter. *New Orleans* v. *Citizens Bank*, 167 U. S. 371, 388-389; *Bank of Kentucky* v. *Stone*, 88 Fed. 384, 395 (C. C. D. Ky.), affirmed 174 U. S. 799; *Gunter* v. *Atlantic Coast Line*, 200 U. S. 273, 284 ff; *Pait* v. *Western Maryland Ry. Co.*, 289 U. S. 620, 626-627.

In the case of *Shields* v. *Utah Idaho R. Co., supra*, from which we have quoted the situation in regard to the parties was the same as is here presented. There the United States District Attorney was the party defendant who threatened to take action against the plaintiff, as does the Collector in this suit. The injunction that was issued in the lower courts ran against the District Attorney. The fact that the Interstate Commerce Commission intervened in the case did not affect the situation. Although no question as to the identity of the parties to the estoppel of the Commission's determination was discussed by the Supreme Court, this Court would not be at liberty to render decision at variance with that announced by the Supreme Court in the completely analogous situation.

We have given careful consideration to the earlier Supreme Court decisions cited and relied upon by plaintiff in support of its motion, including *State Corporation Commission of Kansas* v. *Wichita Gas Co.* 290 U. S. 561, 78 L. Ed. 500-504; *B. & O. Ry. Co.* v. *United States*, 298 U. S. 349, 80 L. Ed. 1209-1224; *United Gas Public Service Co.* v. *Texas*, 303 U. S. 123, 82 L. Ed. 702-711; *Crowell* v. *Benson*, 285 U. S. 22, 76 L. Ed. 598; *South Chicago Coal & Dock Co.* v. *Bassett*, 104 F. (2d) 522-525 (C. C. A. 7); *Ohio Valley Water Co.* v. *Ben Avon*, 253 U. S. 287, 64 L. Ed. 908-914. It may be conceded that different views have been expressed

as to the effect to be given in the courts to the determinations of administrative bodies under the varying circumstances presented in the adjudicated cases. No good purpose would be served by attempting a review of them in this opinion. None of those referred to would justify a refusal to follow those late decisions upon which we have relied.

We conclude that the plaintiff's motion to strike out the parts of defendant's and supplemental answer referred to in the motion should be denied and we so order.

Upon the pleadings now presented the finding of the court would be that the plaintiff was a producer of bituminous coal within the meaning of the Act at the times in the petition referred to, and the court would receive no testimony offered to the contrary.

But our ruling on the motion is made with full recognition of the right of the plaintiff to litigate the issues as to the validity or application of the statutory provisions concerning the "tax" or the rights which the plaintiff as a non-code member producer of bituminous may have in regard to the same.

Filed March 4, 1940.

EXHIBIT "B".

UNITED STATES CIRCUIT COURT OF APPEALS,
EIGHTH CIRCUIT

No. 421, Original.

MAY TERM, A. D. 1939.

SUNSHINE ANTHRACITE COAL COMPANY,
Petitioner.

vs.

NATIONAL BITUMINOUS COAL COMMISSION,
Respondent.

[June 19, 1939.]

Petition to Review Order of National Bituminous Coal Commission.

Mr. Henry Adamson (Mr. George O. Patterson, Jr., Messrs. Patterson & Patterson, and Messrs. Adamson, Blair & Adamson were with him on the brief) for petitioner.

Mr. Robert E. Sher, Special Assistant to the Attorney General (Mr. Thurman Arnold, Assistant Attorney General; Mr. Hugh B. Cox, and Mr. Robert L. Stern, Special Assistants to the Attorney General; Mr. Robert W. Knox and Mr. John W. Nance, were with him on the brief) for respondent.

Before GARDNER and WOODROUGH, Circuit Judges, and OTIS, District Judge

WOODROUGH, Circuit Judge, delivered the opinion of the court.

The Sunshine Anthracite Coal Company has petitioned for a review of an order of the National Bituminous Coal Commission by which it was determined that the underlying coal in certain counties of Kansas is bituminous coal within

the meaning of the Bituminous Coal Act of April 26, 1937 (15 U. S. C. A. 829 *et seq.*), and by which the petitioner's coal was denied exemption from the operation and effect of the Act.

The record discloses that the Sunshine Anthracite Coal Company, petitioner herein, is a corporation engaged in the production of coal in what is known as the Spadra field, located in Johnson County, Arkansas. Practically all of its coal is sold in states other than Arkansas. On July 27, 1937, the National Bituminous Coal Commission issued its Order No. 28, providing a method whereby producers of coal might secure a determination by the Commission as to whether or not their coal is subject to the Bituminous Coal Act of 1937. On August 31, 1937, petitioner filed with the Commission an application for a certificate exempting it from the operation and effect of the Bituminous Coal Act of 1937 on the ground that the coal produced by it is not bituminous coal as defined in Section 17 of the Act, which reads in part:

"As used in this Act—

(a) The term 'coal' means bituminous coal.

(b) The term 'bituminous coal' includes all bituminous, semibituminous, and subbituminous coal and shall exclude lignite, which is defined as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per centum or more."

On September 24, 1937, the Commission issued Order No. 53, directing that a public hearing be held on October 4, 1937, at Fort Smith, Arkansas, for the purpose of receiving evidence to enable the Commission to determine whether or not any part of the coal produced in Arkansas is or is not bituminous coal as defined in Section 17 (b) of the Act. The Order further provided that the hearing should include a hearing on the application for exemption filed by the Sunshine Anthracite Coal Company and on any other applications for exemption filed from the State of Arkansas pursuant to Order No. 28. An examiner was assigned to conduct the hearing.

After notice, the hearing was held as directed on October 4, 5, and 6, 1937. At the hearing the Sunshine Anthracite Coal Company introduced evidence in support of its claim that the coal produced by it was not bituminous coal within the meaning of the Act. This evidence was to the effect that petitioner's coal is mined from what is known as the Spadra field in Johnson County, Arkansas; that coal from this field has been advertised and sold as Arkansas anthracite in various markets for a number of years; that by certain methods of classifying coals by rank on the basis of chemical analysis, including the method adopted by the American Society for Testing Materials, petitioner's coal is classified as semianthracite.

When petitioner concluded the presentation of its evidence, the examiner heard further evidence upon the question indicated by the order of hearing. This evidence tended to show that the term "anthracite coal" had come to be identified in the trade as Pennsylvania anthracite; that there is a substantial difference in price between Spadra coal and Pennsylvania anthracite; that coal produced by petitioner and others from the Spadra field is sold in the various markets of the middle west in direct price competition with West Virginia Pocahontas, which is a low volatile bituminous coal; that in its physical characteristics Spadra coal more nearly resembles other bituminous coals than Peninsylvania anthracite; that Spadra coal burns with a yellowish flame, which is characteristic of bituminous, rather than with a blue flame, which is characteristic of anthracite; that the methods and appliances used in mining the coal are similar to those used in mining bituminous coal in other parts of the country and differ materially from the methods used in mining anthracite; that the miners in the Spadra field are paid on the basis of the bituminous contract of the United Mine Workers and not on the basis of the higher wage scale in effect in the anthracite field.

The evidence further showed that there were at least sixteen different methods of classification of coals by rank, on the basis of chemical analysis, under some of which petitioner's coal would be classified as bituminous and under others as semianthracite; that while, under the method

of classification adopted by the American Society for Testing Materials, petitioner's coal would fall in the semianthracite class, it is very close to the dividing line between semianthracite and the highest ranking bituminous coal; that the American Society for Testing Materials, which is a private organization without official status, issued certain standards as tentative in the year 1934; that such standards have been changed in certain respects from year to year until its present standards were adopted in 1937, after passage of the Bituminous Coal Act of 1937.

At the conclusion of the evidence the examiner took the matter under advisement. On January 21, 1938, he filed a report, which is dated December 3, 1937, containing proposed findings of fact and a recommendation that an order be entered declaring all coals produced in the State of Arkansas to be subject to the Bituminous Coal Act of 1937 and that petitioner's application for exemption be denied. On the same day petitioner filed with the Commission a motion for voluntary dismissal of its application for exemption. This motion was denied by the Commissioner on February 3, 1938.

Petitioner was served with a copy of the examiner's report and filed exceptions thereto. On April 28, 1938, the Commission issued a proposed report containing tentative findings of fact and a conclusion that all coal in the State of Arkansas, including that of petitioner, is subject to the Bituminous Coal Act of 1937. Petitioner was served with a copy of the proposed report and findings and given thirty days in which to file exceptions. Exceptions were filed and on July 7, 1938, counsel for petitioner appeared before the Commission and made oral argument in support of its position.

On August 31, 1938, the Commission rendered an opinion in which it reaffirmed the position taken in its earlier report that all coals produced in Arkansas, including that of petitioner, are subject to the Act. An order was entered the same day denying petitioner's application for exemption and declaring that all coals produced in certain named counties in Arkansas are bituminous coal. Petitioner did not file any objections or exceptions to the final order of the

Commission but petitioned this court for review under Section 6-b (15 U. S. C. A. 836b).

The petitioner's assignments of error to this Court present (1) that the Commission was without jurisdiction; (2) that it erred in denying the petitioner's motion for voluntary dismissal; (3) that the findings and order are without substantial evidence to support them.

(1) Jurisdiction. The petitioner contends that the jurisdiction of the National Bituminous Coal Commission in fixing maximum and minimum prices, rules and regulations, is limited by the Act to coal producers who have accepted the code, and that as petitioner has not become a code member the Commission is given no power to hold a hearing and determine the class or kind of coal produced from petitioner's mines. It argues that "w' ther or not the coal it produces is bituminous, anthracite, semianthracite, lignitic or what not, is of no interest to the Commission until such time as the producer applies for membership in the Code."

The Commission has rested its jurisdiction to determine whether petitioner's coal is bituminous within the meaning of the Act upon two separate and distinct bases: (1) Upon the general power of the Commission to make all reasonable rules and regulations for carrying out the provisions of the Act [1] and (2) upon the power to grant exemptions under Section 4 A.[2]

[1] "Such Commission shall have the power to make and promulgate all reasonable rules and regulations for carrying out the provisions of this subchapter * * *." 15 U. S. C. A. 829 (a).

[2] "Any producer believing that any commerce in coal is not subject to the provisions of sections 831, 832 and 833 or to the provisions of the first paragraph of this section may file with the Commission an application, verified by oath or affirmation for exemption, setting forth the facts upon which such claim is based. The filing of such application in good faith shall exempt the applicant, beginning with the third day following the filing of the application, from any obligation, duty, or liability imposed by sections 831, 832 and 833 with respect to the commerce covered by the application until such time as the C mmission shall act upon the application. If the Commission has re son to believe that such exemption during the period prior to action upon the application is likely to permit evasion of the sub chapter with respect to commerce

We think the grounds of jurisdiction relied upon by the Commission are fully sustained. They are presented as follows:

> "The Bituminous Coal Act provides that the National Bituminous Coal Commission established thereunder shall proceed to fix minimum prices for coal. District boards of producers are to be organized. Section 4-I (a). These Boards, as soon as possible after their creation, are to determine from cost data submitted to them by the statistical bureaus of the Commission 'the weighted average of the total costs of the *ascertainable tonnage produced* in *the district in the calendar year 1936.*' Section 4-II (a), 7th paragraph. The Commission is then to determine from the weighted average costs submitted by the district boards the average costs of larger geographic units known as minimum price areas. Section 4-II (a), 7th paragraph. The Commission transmits the average so determined back to the district boards, and each board is required to propose minimum prices for each district so as to yield a return equal to the weighted average cost of its minimum price area. Section 4-II (a), 3rd paragraph. The prices so proposed are to be submitted to the Commission for approval, disapproval, or modification. Section 4-II (a), 5th paragraph. Prices then are to be coordinated among the various districts and the coordinated prices submitted to the Commission for approval. Section 4-II (b).

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in coal property subject to the provisions of sections 831, 832 and 833 or of the first paragraph of this section, it may suspend the exemption for a period not to exceed ten days. Within a reasonable time after the receipt of any application for exemption the Commission shall enter an order granting, or, after notice and opportunity for hearing, denying or otherwise disposing of such application. As a condition to the entry of and as a part of any order granting such application, the Commission may require the applicant to apply periodically for renewals of such order and to file such periodic reports as the Commission may find necessary or appropriate to enable it to determine whether the conditions supporting the exemption continue to exist. Any applicant aggrieved by an order denying or otherwise disposing of an application for exemption by the Commission may obtain a review of such order in the manner provided in subsection (b) of section 836." 15 U. S. C. A. 834.

"The activities of the Commission and the district boards can not, of course, be carried on unless they know what coal is subject to the Act. The very first step in the price fixing process is the determination of the weighted average cost 'of the ascertainable tonnage' of the coal produced in each district. Thus, at the very beginning some means of defining 'ascertainable tonnage' is necessary.

"Section 17 of the Act contains the basic definitions. But its definitions do not in themselves establish any mechanism for determining what coal comes within them.

"At the very beginning of its proceedings the Commission found itself faced with the necessity of deciding what coal was to be included within the 'ascertainable tonnage' in computing average costs. The determination had to be made in advance of other action if the Commission was to proceed. The Act did not create any other agency than the Commission capable of making it. The Commission obviously was not in a position to call upon the courts to construe the Act for it in that stage of the proceedings in order to aid it in its administrative process.

"Section 2 (a) of the Act authorizes the Commission to make all reasonable rules and regulations for carrying out the provisions of the Act. Since the Commission could not function unless the nature of the coal subject to the Act was determined, it issued its Order No. 28, which provided a procedure for determining what coal was subject to and what exempt from the statute. Subsequently it ordered a general investigation to be held as to the character of coals in Arkansas, and combined the hearing under the latter order with that on petitioner's application for exemption.

"We believe that the power of the Commission to make such orders would be implied from the inherent necessities of the situation, even if there had been no authority in the Act to make all reasonable rules and regulations. Congress obviously did not intend that the scope of operation of the Act in certain areas containing coal on the border line of the statutory defini-

tion should remain indefinitely indeterminate. The statute plainly could not be carried out unless and until it was decided which coal came within the statutory definition.

"There is ample precedent for administrative bodies determining their own jurisdiction at the commencement of the investigation of a question, subject, of course, to appropriate judicial review. In Myers *v.* Bethlehem Shipbuilding Corp., 303 U. S. 41, an employer sued to restrain the National Labor Relations Board from holding a hearing on a complaint of alleged unfair trade practices on the ground that the employer was not engaged in interstate or foreign commerce and therefore not within the jurisdiction of the Board. In disposing of this contention, the court said, at p. 49:

> " 'It is true that the Board has jurisdiction only if the complaint concerns interstate or foreign commerce. Unless the Board finds that it does, the complaint must be dismissed. And if it finds that interstate or foreign commerce is involved, but the Circuit Court of Appeals concludes that such finding was without adequate evidence to support it, or otherwise contrary to law, the Board's petition to enforce it will be dismissed, or the employer's petition to have it set aside will be granted.'

"The National Labor Relations Act does not expressly authorize the Labor Relations Board to determine whether or not an employer is engaged in interstate or foreign commerce. Section 8 of that act (29 U. S. C., Sec. 158) defines certain unfair labor practices. Section 10 (a) (29 U. S. C., Sec. 160 (a)) provides that the Board is empowered to prevent any person from engaging in any unfair labor practice (listed in Section 158) affecting commerce. The term 'affecting commerce' is defined as meaning in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce

or the free flow of commerce. On the basis of this language the Supreme Court held that it is for the Board to determine, after notice and hearing, whether or not a particular unfair labor practice affects commerce. So here, where a determination of the character of coals in different parts of the country was a necessary incident to the performance of its other functions, the Commission was authorized to make the necessary determination.[1]

"Other cases in which the Supreme Court has indicated that it was proper for administrative agencies to determine their own jurisdiction are Interstate Commerce Commission *v.* Humboldt Steamship Co., 224 U. S. 474; United States ex rel. Chicago Great Western Railroad Co. *v.* Interstate Commerce Commission, 294 U. S. 50.

"Petitioner argues that any power the Commission may have to determine what coal is subject to its jurisdiction is limited to 'code members,' and that since it is not a code member, the Commission's authority does not extend to it. The contention is that since the Commission is authorized to fix prices only for code members,[2] there is no reason for it to be interested in the nature of the coal produced by non-code members. It is true that the Commission may only fix minimum prices for code members, and then only for sales of coal in or directly affecting interstate commerce. But the general powers of the Commission are not limited to code members. The Commission is required to base its weighted average cost figures—on which all the minimum prices ultimately rest—on the 'ascertainable tonnage' in the district, not alone on that of code members. In order that it may obtain reports on costs

[1] "We are not here concerned with the scope of judicial review of such determinations or whether the courts may have wider latitude in reviewing when the jurisdictional question relates to the limits of Federal constitutional power than otherwise.

[2] "Producers who do not accept the code and thereby become code members are required to pay a 19½ per cent tax on their gross sales. Section 3.

from all producers, Section 10 (a) of the Act authorizes the Commission to require cost reports from 'producers,' not merely from code members. Producers are defined in the Act as meaning 'all individuals, firms, associations, corporations, trustees, and receivers engaged in the business of mining coal,' whereas code members mean only 'producers accepting membership in the code.' Section 4.

"In a case involving the status of these cost reports, the only case under the Coal Act which has reached the Supreme Court, that Court held that the 'language of Section 10 (a) applies to all producers.' Utah Fuel Co. *v.* National Bituminous Coal Commission, 59 S. Ct. 409, decided January 30, 1939.

"The Commission is thus plainly empowered to require the filing of cost reports by all producers of bituminous coal, whether code members or not. Since it must have such information as to costs from all producers, its power to determine what coal is bituminous must likewise extend to noncode members as well as to code members.

"Petitioner's suggestion that the jurisdiction of the Commission is limited to code members would lead to extremely impractical results. If the costs of only code members could be considered in computing the weighted average cost upon which prices were to be based, that average would change almost daily, whenever a new producer accepted the code. A national price structure built on such a shifting base would be an extremely unstable one. Moreover, it was obviously more desirable from the standpoint of both the public and the industry to give the minimum prices the broadest possible foundation of average cost.

"We think that the necessary power of the Commission to determine what coal comes within the Act must apply equally to code members and to noncode members. Thus, the Commission had jurisdiction both generally to investigate the status of all coal in Arkansas and specifically to determine whether petitioner's coal was subject to the Act.

"(2) What has been said demonstrates that in order to accomplish its statutory duties the Commission must have power on its own initiative to investigate the status of coal to determine whether it is subject to the Act, regardless of whether particular producers file applications for exemption. By Section 4-A of the Act Congress established a procedure specially designed to give protection to individual producers claiming to be exempt.

"The second paragraph of Section 4-A provides that any producer believing that any commerce in coal is not subject to the provisions of Section 4 or of the first paragraph of 4-A may file with the Commission an application for exemption. The filing of such an application exempts the applicant beginning with the third day thereafter from the obligations imposed by Section 4 of the Act. Within a reasonable time after receipt of an application for exemption the Commission is required to enter an order granting, or after notice and opportunity for hearing, denying or otherwise disposing of such application. An order of the Commission disposing of such application is reviewable in the manner provided in Section 6 (b).

"The section thus provides a complete and adequate remedy, including protection during the course of the administrative proceeding, for persons claiming to be exempt from the Act.

"The contention of petitioner that this section is not applicable to noncode members and consequently is not applicable to it, is inconsistent with the theory on which petitioner has invoked the jurisdiction of this Court, which seems to be bottomed largely on Section 4-A. But apart from this it is plain that Section 4-A is not limited in application to code members. It provides that 'any producer' may file an application for exemption. As we have pointed out 'producer' is defined in the Act as including all producers of coal, while 'code member' is defined as meaning only those producers who accept the code. The decision of the Supreme Court in the *Utah Fuel* case, *supra*, that the

word 'producer' as used in Section 10 (a) applies 'to all producers' is plainly controlling with respect to the same word as used in Section 4-A.

"'The obvious purpose of Section 4-A also reflects that it was intended to apply to all producers rather than merely to code members. Congress sought to establish a procedure to enable producers to know whether they were subject to the Act. Producers who were not code members might for various reasons desire to know whether or not they were exempt before joining the code; the decision on their application for exemption might determine whether or not they would accept the code.

"In this case petitioner filed an application for exemption with the Commission. The Commission, following the procedure prescribed in the statute, held a hearing and entered an order. Petitioner now, still following the plan ouflined in Section 4-A, seeks to have that order reviewed in this Court. Under these circumstances there can be no doubt as to the Commissioner's jurisdiction to hold the hearing and make the order involved in the review.

"As the Commission had jurisdiction to make the determination as to whether petitioner's coal was subject to the Act, the scope of judicial review of its ruling is that set forth in the recent opinion of the Supreme Court in Shields *v.* Utah Idaho Central R. R. Co., 59 Sup. Ct. 160, (305 U. S. 177, 185) decided December 5, 1938, The Court there said, at p. 165:

> "'As this authority [to make the determination in question] was validly conferred upon the Commission, the question on judicial review would be simply whether it had acted within its authority.' [Citing cases.]
>
> "'The condition which Congress imposed was that the Commission should make its determination after hearing. There is no question that the Commission did give a hearing. Respondent appeared and the evidence which it offered was received and considered. The sole remaining question would be

whether the Commission in arriving at its determination departed from the applicable rules of law and whether its finding had a basis in substantial evidence or was arbitrary and capricious. That question must be determined upon the evidence produced before the Commission.'

"The principles there set forth are plainly applicable here whether the Commission's authority is derived from the express language of section 4-A or the general provisions of section 2(a).

"Section 6 (b) of the Bituminous Coal Act provides that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. It should be noted that in the *Shields* case the statute involved did not contain any such provision, so that the limitation upon the scope of judicial review there recognized a *fortiori* applies here."

(2)

Petitioner's motion for voluntary dismissal of its petition for exemption was made on the same day that the report of the examiner was filed, though the examiner's report bears date some six weeks earlier. The petitioner's position is that it had unqualified right to dismiss. *Jones* v. *Securities Exchange Commission*, 298 U. S. 1, is cited and relied on.

In order for the Commission to perform the functions required of it by the terms of the Bituminous Coal Act it was necessary that it should proceed as one of the first steps to make determination whether the coals in the counties of Arkansas were subject to the Act. The public interest in the effective administration of the Act required that to be done, irrespective of the petitions for exemption presented by the petitioner and the two other Arkansas coal producing companies which associated themselves with the petitioner in the claims for exemption. Some of the Spadra coal producers thought their coal was bituminous within the Act, but it was recognized by all of them that a decision had to be made covering the whole field. The Com-

mission accordingly gave the notice and caused the hearing to be had "for the purpose of receiving evidence to enable the Commission to determine whether or not any part of the coal produced in the State of Arkansas does not come within the purview of Section (b) of the Act." Although the petition for exemption presented by the Sunshine Anthracite was in the form of affirmative action taken by it and in the order of taking the proof at the hearing the Sunshine company presented evidence first, the real moving party seeking determination of the broad question as to the applicability of the Act to Arkansas coals was the Commission. The petitioner opposed the conclusion that all the coals in the area were within the Act. It could not by dismissing its petition prevent the Commission from making determination upon that question which was the subject matter of the hearing.

The Commission's determination set forth in the first paragraph of the order under review that all Arkansas coals, including those of petitioner, are subject to the Act, would be equally binding upon petitioner whether it withdrew from the hearing before the final decision thereon or not.

The case of *Jones* v. *Securities Exchange Commission, supra,* does not support the petitioner's assignment of error. There Jones had withdrawn his application for registration of his securities before hearing, and the court found nothing in the record to indicate that the public or investors would be prejudiced by stopping the proceedings or dismissing the same. The court said:

> "In this proceeding, there being no adversary parties, the filing of the registration statement is in effect an *ex parte* application for a license to use the mails and the facilities of interstate commerce for the purposes recognized by the act. We are unable to see how any right of the general public can be affected by the withdrawal of such an application before it has gone into effect. Petitioner emphatically says that no steps had been taken looking to the issue of the securities; and this is not denied. So far as the record shows, there were no investors, existing or potential,

to be affected. The conclusion seems inevitable that an abandonment of the application was of no concern to anyone except the registrant. The possibility of any other interest in the matter is so shadowy, indefinite, and equivocal that it must be put out of consideration as altogether unreal. Under these circumstances, the right of the registrant to withdraw his application would seem to be as absolute as the right of any person to withdraw an ungranted application for any other form of privilege in respect of which he is at the time alone concerned."

In this case there were other interests than those of the petitioner concerned in the hearing—the interest of the public in the effective administration of the Act, and the interests of petitioner's competitors. Some competitors who had accepted the Act were convinced that if petitioner could obtain exemption from the Act it could drive all its Arkansas competitors from the field. Although the Arkansas coal has great merit, it is hard to sell in sufficient quantity to maintain the mine organization or to provide continuous employment for the miners. The competition among the mines presents the most difficult problem of the operators, and those competitors who did not associate themselves with petitioner to deny that the Arkansas coal was within the Act were vitally concerned to have it determined that the Act applied to all alike. We find no prejudicial error in the denial of petitioner's motion to dismiss made after the conclusion of the hearing. The Evidence: The testimony before the Commission, which has been epitomized for this Court by counsel of the Commission and carefully compared and considered, included that of H. W. Collier. He has been in the coal-mining business since 1901 and at the time of the hearing was operating a mine in the Spadra field, three or four miles from petitioner's mine, taking coal of the same type from the same seam. He identified certain samples of coal taken from petitioner's mine and other mines in the same vicinity and testified that in his opinion they were all semibituminous. He testified that semibituminous is a smokeless coal and cokes very little. Anthracite coal burns with a

blue flame, all other coals with a more or less yellow flame. All Arkansas coals have a more or less yellow flame. Spadra coal does not resemble Pennsylvania anthracite in looks, hardness, or friability. Pennsylvania anthracite is much harder and less friable than Spadra or other coals in that section. Spadra coal is very similar in appearance to West Virginia Pocahontas and Paris, both of which are semibituminous. He further testified that south of Omaha, Nebraska, Spadra coal competes primarily with other coals from Arkansas and Oklahoma; north of Omaha almost entirely with Pocahontas. In the Twin Cities the retail prices of Spadra and Pocahontas are usually about the same. Spadra prices are based on the prices of other coals in the immediate vicinity and of Pocahontas; not on Pennsylvania anthracite.

Heber Denman testified that he was graduated from Lehigh University as a mining engineer in 1882 and has been operating mines in Oklahoma and Arkansas since 1898; that Spadra coal is taken from what is known as the Hartshorne seam and that coals from that seam are generally known and recognized as semibituminous. He further testified that all of the coal introduced in evidence (which included a sample from petitioner's mine) was semibituminous with the exception of Exhibit 1, which he identified as Pennsylvania anthracite. He further testified that Spadra coals compete primarily with other coals from the vicinity and with Pocahontas from West Virginia. On cross-examination he testified that there is a difference between Spadra coal and some of the other coals in Arkansas, that they differ with respect to the hardness of the coal and in the amount of fixed carbon and volatile matter, but that the difference is not sufficient to place Spadra coal in a different classification. He reiterated the opinion expressed on direct examination that Spadra coal is semibituminous.

S. A. Bramlette testified that he has been connected with the coal industry for 40 years, and that there was no anthracite or semianthracite coal in Arkansas; that Arkansas coals compete primarily with other coals from the same general area, but more particularly with West Virginia Pocahontas,

which is a low volatile, high grade bituminous coal. He further testified that at one time he put on an exhibit of Spadra coal at the State Fair at Little Rock at the request of the producers of that field to demonstrate the burning quality of the coal. On the basis of his experience and observation in connection with that experiment, he testified that Spadra coal is slow in igniting, but lights with a yellowish flame, and that the yellowish flame continues until the entire mass of coal becomes a red body. He also testified that the term semianthracite denotes a lower rank of coal than anthracite, whereas the term semibituminous is the same as superbituminous and denotes a higher rank of coal than bituminous. Subbituminous is a lower rank than bituminous. He also testified that Spadra coal competes principally with West Virginia Pocahontas and not with Pennsylvania anthracite.

J. G. Puterbaugh testified he has been in the coal business for 42 years and at the time of the hearing was operating a mine at Spadra, about three-quarters of a mile from that of petitioner, taking coal from the same seam. He testified that Spadra coal has the appearance of West Virginia Pocahontas as well as of other coals produced in Western Arkansas; that it is not as bright, shiny, or brittle as Pennsylvania anthracite; that wages in the Spadra mine are fixed on the basis of the bituminous wage contract of the United Mine Workers; that the price of Spadra coal is fixed on the basis of the prices of other coals produced in Arkansas. He further testified that the market for Spadra coal is in western Missouri, eastern Kansas, and eastern Nebraska, and to a larger extent in Minneapolis and St. Paul, where it competes primarily with Pocahontas. In the winter of 1936-7, the retail price of Pocahontas in Minneapolis was 90¢ a ton higher than the retail price of Spadra. On the first of September 1937, the retail price of Pocahontas was 50¢ lower than Spadra. The prices of the two coals are very close together and fluctuate about as those figures indicate.

R. A. Young testified he has been a coal operator for 40 years and at one time was Arkansas state mine inspector; that in his opinion there was no semianthracite

coal in Arkansas, and that all Arkansas coal was bituminous.

David Fowler, president of District 21 of the United Mine Workers, testified that he had been in the coal industry since he was nine years old; that he had worked in the mines for 35 years, most of the time in the anthracite fields of Pennsylvania but some of the time in various bituminous fields. He stated that he was able to distinguish anthracite and bituminous by their appearance; that all of the coals introduced in evidence (including that from petitioner's mine) were either bituminous or semibituminous, except for Exhibit 1, which he identified as Pennsylvania anthracite. He further testified that the United Mine Workers have two basic contracts, one for bituminous and one for anthracite; that the wage scale in the Spadra field is based on the bituminous contract; that had the anthracite contract been in effect, the miners would have received three dollars a day more. He further testified that there is a great difference in the methods of mining in the anthracite fields of Pennsylvania and the methods used in the Spadra field in Arkansas.

Petitioner's president stated that they were perfectly willing to admit that they mine coal differently in the anthracite fields of Pennsylvania than they do in Arkansas, no matter what the seam.

Petitioner's Exhibit 10 shows that the prices of "Arkansas Anthracite" and of West Virginia Pocahontas in effect in Minneapolis in November 1935 were substantially the same. Arkansas egg was $13.45 a ton; Pocahontas egg was $13.79; Arkansas stove was $13.70 a ton; Pocahontas stove was $13.40. Pennsylvania anthracite was approximately $2.50 a ton higher in price.

The Commission found, i. a.

> "2. The coal produced by petitioner and intervenors is generally similar to the high grade bituminous coals of other fields, such as the Pocahontas Smokeless coals of West Virginia. The structure is hard but not as hard as Pennsylvania anthracite coal; nor does it have the structure and appearance of anthracite. It is a low volatile coal with a high percentage of fixed carbon, but not as high as that of anthracite, and the sulphur

content is high. It is mined in the same manner as bituminous coal is mined which differs materially from the methods of mining anthracite. Spadra coal, including that of petitioner and intervenors is mined under the Bituminous Wage Scale which is substantially lower than the Anthracite Wage Scale. Spadra coal has the appearance of bituminous coal and its burning characteristics are similar thereto and unlike those of anthracite. Coals mined in adjoining fields have qualities comparable with the coals of the Spadra field, although they differ slightly in volatile matter and fixed carbon, but the difference is so slight as to be unnoticeable in the merchandising thereof. The coals of adjoining producers in the Spadra field enter the same consuming markets as the coals of the petitioner and intervenors in competition with one another without regard to differences in their qualities. All Spadra coals are competitive in northern markets with the Smokeless coals of West Virginia and other high-grade bituminous coals, but in no markets are they competitive with Pennsylvania anthracite.

"5. There was much expert testimony offered to the effect that all coal in the Spadra field is bituminous coal. There is noticeable agreement among all the witnesses and it is admited by petitioner and intervenors that their coal is the same as that produced by their neighbors in the same field. The great weight of the expert testimony is to the effect that all Spadra coal is bituminous, is well established as such, and has been so established over a long period of years in the various markets into which it moves."

It is the position of the Commission that it was not bound to make its determination as to the status of the coal solely on the basis of the chemical analysis of the coal calculated according to the formula adopted by the American Society for Testing Materials. Its counsel presents:

"In the first place, chemical analysis alone is not controlling. It is a factor that is entitled to consideration. In its opinion the Commission recognizes that

chemical analysis, including the proper fuel ratio, is an important element to be considered. But it is not the sole factor. If Congress had intended that chemical analysis was to be the sole guide for Commission action, it is reasonable to suppose that it would have said so in plain and explicit language.

"That no one factor is controlling in determining the classification of coal is clearly indicated by the *Supreme Court in Heisler v. Thomas Colliery Co.*, 260 U. S. 245. In that case it was argued that because anthracite and bituminous were directly competitive, it was arbitrary to classify them differently for purposes of taxation. The Court held that the mere fact of competition was not controlling, but that all other factors, such as the amount of fixed carbon, the amount of volatile matter, color, lustre, structural character, and other physical characteristics were entitled to consideration. On the basis of all of these factors, not of any one alone, it was held that the differences in the two coals afforded a sufficient basis for classifying them differently.

"It does not appear that Congress intended that the particular formula for classifying coals by rank adopted by the American Society for Testing Materials shall be binding on the Commission.

"L. N. Plein, formerly with the Bureau of Mines and presently employed as a technician by the Bituminous Coal Commission, testified as to the history of classification of coal. He testified that since 1800 there have been many attempts to classify coal in some way or other. He named at least sixteen methods that had been put forward by different authors. He stated that all of these various methods of classifying coals are very confusing when we come to the practical side of determining what coal is and *how to sell it*. In 1927 the American Society for Testing Materials appointed a committee to make a study of the classification of coals. In 1934 this Committee published certain 'Tentative Specifications for Classification of Coals by Rank'. Changes were made in the tentative standards

in 1935 and in 1936. During the week of September 20, 1937, the tentative standards were given final approval by the Committee.

"The A. S. T. M. formula classifies coal by rank according to fixed carbon and calorific value calculated on a mineral-matter-free basis. Under this formula the highest ranking anthracite is meta-anthracite, then anthracite, then seminanthracite. Immediately below seminanthracite is low volatile bituminous, which is the highest ranking bituminous. Semianthracite is defined as non-agglomerating coal with a fixed carbon content of between 86 and 92 per cent calculated on a dry mineral-matter-free basis. Low volatile bituminous is coal having a fixed carbon content of between 78 and 86 per cent calculated on a dry-mineral-matter-free basis. There is no such classification as semibituminous.

"It is true that under this formula, petitioner's coal would fall in the semianthracite class. Analyses of coal taken from petitioner's mine show that its fixed carbon content ranges from 86.39 to 88.04 per cent. It is just over the line between low volatile bituminous and semianthracite, almost in what might be called the twilight zone between the two.

"If the A. S. T. M. standard is controlling in the situation here presented, it can only be because Congress so intended. The Bituminous Coal Act of 1937 makes no mention of the A. S. T. M. standards. The tentative standards were first announced in 1934 and were widely accepted. Congress was either aware or unaware of the existence of such standards when it passed the Act. If it was unaware of them, it obviously could not have intended them to be controlling. If Congress was aware of the existence of the A. S. T. M. standards, the fact that it adopted an entirely different classification indicates that it did not enact that particular formula into law. The statute refers to only three kinds of bituminous coals, bituminous, semibituminous, and sub-bituminous; the word 'semibituminous' was used to describe the highest grade of bituminous coal. The A. S. T. M. classifies bitumin-

ous as low volatile bituminous, medium volatile bituminous, high volatile A bituminous, high volatile B bituminous, high volatile C bituminous, subbituminous, A, subbituminous B and subbituminous C. It makes no mention of any such coal as 'semibituminous.' If Congress had intended the A. S. T. M. standards to govern it would either have expressly so provided, or indicated.

"That Congress did not have the A. S. T. M. classification in mind is further indicated when we consider the definition of lignite. Section 17 (b) provides that lignite shall be excluded from the Act and defines it as a lignitic coal having calorific value in British thermal units of less than seven thousand six hundred per pound and having a natural moisture content in place in the mine of 30 per cent or more. The A. S. T. M. classification defines lignite as a coal having less than eighty-three hundred moist British thermal units. Thus, even where Congress adopted a scientific test, it used one that differed from that adopted by A. S. T. M.

"But the American Society for Testing Materials is not an official body. It is not subject to governmental control. It has a constantly shifting membership. It may change its standards from day to day, from year to year. It has in fact made some changes in its standards in each of the years since the tentative standards were first put forth in 1934. Two such changes directly affecting petitioner's coal were (1) the change from the agglutinating test to the agglomerating test for anthracite, and (2) the change in the specification for low volatile bituminous from a range of 14 to 23 per cent of volatile matter to a range of 14 to 22 per cent. Changes of even greater significance might have been made had the Society seen fit to do so. Thus, coal which is subject to the provisions of the Act on one day may be entirely free from either regulation or tax the next because of the decision of a private organization in no way interested in or concerned with the effect of their determination on the administration of the Act. Irrespective of any question of the pro-

propriety of the delegation of legislative power were the Act so construed, there is every reason for avoiding a construction so plainly out of harmony with orderly administration of law.

"We should like to point out that we have no quarrel with the method of classification adopted by A. S. T. M. It is a good method. It is entitled to weight in arriving at a definition of terms. But it is only one of many factors that must be considered. And where on every other basis except chemical analysis a coal more nearly resembles bituminous than anthracite, and where the exclusion of such coal from the provisions of the Act would give its producers an unfair competitive advantage over neighboring producers and tend to break down the orderly administration of the statute, the determination of the Commission that such coal comes under the Act was clearly justified.

"What was said by the Supreme Court with reference to the Transportation Act of 1920 in Piedmont & Northern Railway Co. v. Interstate Commerce Commission, 286 U. S. 299, is peculiarly appropriate here. The Court said, at p. 311:

> " 'The Transportation Act was remedial legislation and should therefore be given a liberal interpretation; but for the same reason exemptions from its sweep should be narrowed and limited to effect the remedy intended.'

"If the Commission was authorized to consider other factors than chemical analysis in arriving at its determination, there was ample evidence, as we have already pointed out, to sustain its findings. The classification of coals is a subject requiring a specialized knowledge of the coal industry. In such a field the findings of a Commission specially created for that purpose should not be lightly disturbed on appeal.

"Petitioner makes the suggestion in its brief that Congress intended the word semibituminous to describe a grade of coal of a rank lower than bituminous. Such a definition is at variance with the dictionary definition of the word. Webster's New International

Dictionary 1933. It is also at variance with the uncontradicted evidence in the record. All of the witnesses who testified with respect to it agreed that semibituminous was a higher grade than bituminous and semianthracite a lower grade than anthracite.

"Petitioner also argues that the findings of the Commission should be set aside because hearsay and other irrelevant testimony was introduced at the hearing. To this contention there are two answers.

"First, Petitioner offered no objection to the introduction of this evidence. Section 6 (b) of the Act provides that no objection to an order of the Commission shall be considered by the court on appeal unless the objection shall have been urged below. The failure to object at the hearing before the examiner precludes petitioner from raising such objection here.

"Second. The fact that incompetent or irrelevant evidence got into the record is immaterial if there was competent evidence in the record to sustain the findings. This follows from the language of Section 6 (b), which provides that the findings of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. In disposing of a similar contention in Consolidated Edison Co. *v.* National Labor Relations Board, 59 Sup. Ct. 206, 217, (305 U. S. 197), the Supreme Court said:

> "'The companies urge that the Board received 'remote hearsay' and 'mere rumor'. The statute provides that 'the rules of evidence prevailing in courts of law and equity shall not be controlling'. The obvious purpose of this and similar provisions is to free administrative boards from the compulsion of technical rules so that the mere admission of matter which would be deemed incompetent in judicial proceedings would not invalidate the administrative order. Interstate Commerce Commission *v.* Baird, 194 U. S. 25, 44; Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 227 U. S. 88, 93; United States *v.* Abilene & Southern Ry. Co., 265 U. S. 274, 288; Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420, 442.'

"In that case the Court found from an examination of the record that it contained substantial evidence to support the Board's findings. The rest was disregarded. We have already demonstrated that there is ample competent evidence in the record in this case to sustain the Commission. If there be some evidence in the record that would not be strictly admissible in a judicial proceeding, it is immaterial.

"We do not mean to indicate by the above statement that the Commission might not properly consider evidence that would not be admissible in a court of law under a strict application of the rules of evidence. The same rules of evidence plainly do not apply under the more flexible administrative procedure. But in view of the amount of judicially competent evidence supporting the Commission's determination, we do not feel it necessary to rely on any other testimony or to argue as to its admissibility."

We think the position of the Commission is sustained by the foregoing considerations and that its findings were based on substantial evidence appearing in the record.

We also sustain the claim of the Commission that its findings were appropriate to the testimony and the questions presented. In its opinion, the Commission found:

"(1) That petitioner's mine is in the Spadra field in the Hartshorne seam in Arkansas and that its coal competes with bituminous coals from other fields in the district.

"(2) That petitioner's coal is similar in structure and appearance to high grade bituminous coals from other fields such as Pocahontas from West Virginia; that in the manner of mining and in its burning characteristics it is similar to bituminous and unlike anthracite; that the miners are paid on the basis of the bituminous wage scale which is lower than the anthracite wage scale; that Spadra coals compete in the same consuming markets with the coals of adjoining producers and with high grade bituminous coals from

West Virginia, but are not competitive with Pennsylvania anthracite.

"(3) That the great weight of the expert testimony is to the effect that all Spadra coal is bituminous.

"(4) That approximately 98 per cent of petitioner's production is exported from Arkansas."

After considering and disposing of petitioner's contention that the method of classification of coals by rank promulgated by the American Society for Testing Materials is controlling, the Commission goes on to state:

"The evidence in the record herein shows that the coals of petitioner and intervenors fall short of the description of anthracite and clearly come within the definition of bituminous as the two coals are distinguished and defined in the *Heisler* case, *supra*.

"While the chemical analysis, including the proper fuel ratio, is an important element to be considered, other necessary factors for a proper ranking of coals are physical features or structure and burning characteristics. This Commission, and the former Commission, found it impossible to classify coals upon chemical analysis alone, and since the contention of the petitioner and intervenors stands solely upon chemical analysis, and because of other reasons herein stated, their petition must fall.

* * * * * * *

"To achieve the broad social and economic objectives of the Act, and to place the administration thereof upon a practical basis, we must consider not only chemical analyses, physical structure, and burning characteristics, but also competitive market conditions, uses, and historical circumstances.

* * * * * * *

"For all practical purposes, the coals produced from the Hartshorne Seam, including the Spadra and adjoining fields and the coals of the petitioner and intervenor are the same as the coals of their competitors

and all is bituminous coal as contemplated in Section 17 (b) of the Act and we so hold."

It is clear from the above language that the basis of the Commission's decision is that chemical analysis, while important, is not the sole criterion and that other important considerations are the physical structure, burning characteristics, competitive marketing conditions and uses, and historical circumstances. It was on the basis of all these criteria that the Commission reached the conclusion that petitioner's coal is subject to the Act.

In conjunction with the findings and orders, the Commission rendered its opinion (Docket 68 F. D. August 31, 1938) in which it summarized the facts found by it and analyzed and discussed the evidence before it and referred to the court decisions upon which it relied in reaching its conclusions of law.

It appeared to the Commission that Congress had not defined the coals intended to be regulated by the Bituminous Coal Act with such absolute particularity as to leave no room for construction in order to arrive at the true legislative intent. The Commission could not therefore establish "what is bituminous coal" for all cases. It considered the legislative history and the manifest object and purposes of the Act as disclosed in the "Declaration" and several provisions thereof. Its conclusion that the intent of the Act was to exclude from its operation "anthracite" and "lignitic" coals, and that such coals as those produced in Arkansas were within the Act was fully justified.

We are not persuaded that the Commission failed to find the basic facts necessary to the determination that the coal produced by petitioner was bituminous coal within the Act. The Commission was not required to draw a hard and fast line that would be applicable to all future cases in all conceivable circumstances. It found the basic facts applicable to the situation before it and rested its conclusion thereon. That is all that is required of findings of fact made by administrative agencies.

The Supreme Court on occasion has sent cases back to the trial courts because of the failure of such courts to make sufficiently detailed findings of fact. See Interstate Circuit

v. United States, 304 U. S. 55. We know of no case where the Court has refused to pass upon the merits because the findings of fact were too detailed. The most that can be said against the Commission's findings is that they are possibly more detailed than was necessary. Such a defect is not one that caused any injury to the petitioner. As long as the necessary findings are there, the rest can be treated as mere surplusage.

We find that the petitioner was accorded a full, fair and impartial hearing by the Commission, that there was no procedure taken prejudicial to it, that the findings were based on substantial evidence, and that the orders complained of were within the Commission's jurisdiction.

Affirmed.

UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

In Equity No. 2949.

THE SUNSHINE ANTHRACITE COAL COMPANY,
Plaintiff,

vs.

HOMER M. ADKINS, AS COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF ARKANSAS,
Defendant.

THE COURT:

We have concluded to avoid the delay that would be entailed by the preparation of a formal opinion in this case, notwithstanding the great importance of the questions presented, because of the comprehensive discussions and analyses of the Bituminous Coal Act and the Act preceding it promulgated in the Carter Coal Company case and in the City of Atlanta vs. Commissioner. We are in accord with the opinion in the latter case and the citations generally control the decision here except as to the specific matter of the 19½ per cent tax of Section 3 (b).

We feel that in this case that we had the benefit of an unusually helpful oral argument in that it seems that the vital and determinative questions were clearly presented and with immediate reference to the decided cases that tended to sustain the various contentions that were made.

Now, we have had submitted to us the proposed and requested findings, we have carefully gone over those re-

quested by the plaintiff and in our determination of the case we find no one of these requested findings that are necessary to sustain the conclusions we have arrived at, or necessary to reflect the testimony in the case. There are some that are incorporated in the findings which we shall adopt and we see no occasion for repetition. All the essential matter that we find should be determined upon the testimony we think is included and properly set forth in the findings that have been submitted on behalf of the defendant together with those additional findings which we have made ourselves. On carefully checking over and examining the proposed findings for the Government, we have made some addition and corrections particularly as to the matter of the state of the plaintiff's property and the value of its assets, etc. The plaintiff has not requested specific detailed findings in that regard, nor do we think it necessary to amplify the matter very much. It has been requested that we find that the plaintiff is the lessee of coal lands in Johnson County, Arkansas, owned by the Ozark Coal Company and leased to plaintiff, under a lease which originally required plaintiff to pay a royalty of twenty-five cents per ton for each ton of coal mined and removed but not less than $5,000.00 per year. By a supplemental agreement, the royalty has been reduced to fifteen cents a ton while the mine is in the development stage, the minimum royalty still continuing at $5,000.00 per year. And that part of the finding appears to us to be properly in accord with the allegations and the testimony.

The plaintiff's property is in the development stage at the present time. The tonnage produced and sold has been increased from year to year. In 1939 it was in excess of one hundred thousand tons. There may be a slight inaccuracy in that. There was testimony that between 1937 and 1938 there had not been very much change. The property

the plaintiff is carried on its books at a figure in excess $500,000.00 but it is very heavily encumbered. In part, ecause of the depressed condition of the bituminous coal dustry, plaintiff is unable at present to find a purchaser r its property in a free and open market or to borrow oney thereon from the bank. And then we have the fact at plaintiff's property has been operated at a loss for e past three years and the actual sale value of its property es not exceed $30,000.00. Now there were further find-gs including a finding of the formal matters on which ere has been no controversy as to amount of taxes which e defendant has assumed and purported to lay against aintiff and the dates, manner and so forth, and that the roduction has continued. The historical matter copied in e stipulation as to the state of the industry has been re-ated in the findings, we find that substantially correct xcept one request was made by the Government for us to d, "That another effect of the situation was that the erators wasted the best of the nation's coal reserve be-use they were cheap and readily available." We find no stimony directed to that point exactly and we decline to ake that finding. Otherwise, the formal matters in the ding are in direct conformity, we think, with the evidence. here is a finding of the effect of the proceedings that have en had before the Commission and before the Appellate ourt, as to which we have already indicated, our opinion writing and the finding here correctly recites the facts of ose proceedings.

As to our conclusions of law, we make the formal juris-ictional conclusions. We have a certain jurisdiction, but e do not have jurisdiction to go into the questions already djudicated by the Commission and by the Court of Appeals. e conclude that the Act is constitutional, that the regula-ry provisions are valid exercises of the power of Congress

to regulate commerce, that the procedure for the establishment of prices is within the Constitutional power and sufficient definite standards are indicated. We do not pass on the question of nomenclature of the section that is sought to be given by the plaintiff whether this is a tax or a penalty, but we find it is germane to and adapted to carrying out the purpose of the Act and within the scope of the power of Congress to enact. Now, outside of these findings that have been requested, we have made this finding which is directly, particularly directed to the final order that ought to be entered in this case. It appears to us from the record that the coal company filed its claim for exemption August 31, 1938. The Circuit Court of Appeals affirmed by opinion June 19, 1939. The Supreme Court denied certiorari November 6, 1939. Rehearing was denied by the Supreme Court December 4, 1939. Throughout the period no schedule of prices had been established by the District Board.

The statute Sec. 4-A Paragraph 2 (p. 13) provides that the filing of an application in good faith "shall exempt the applicant from any obligation, duty or liability imposed by Section 4 with respect to the commerce until such time as the Commission shall act upon the application". The exemption may be suspended if there is reason to believe that the exemption during the litigation "is likely to permit evasion of the Act" id.

So-called taxes and penalties were attempted to be applied to plaintiff beginning in March, 1938, and running through September, 1939. Although the statute describes the exemption period by reason of the presentation of application for exemption in good faith as extending to the time when the Commission "shall act" thereon, the extent of such exemption is also qualified by exercise of discretion when it appears "likely to permit evasion of the Act". The test may fairly be said to be the likelihood of such evasion.

The due process for protection of plaintiff's rights is accorded by the opportunity for hearing before the Commission and the hearing by the Court of Appeals on appeal. Together, the procedure before the Commission and the court satisfies the due process requirements. We conclude that the discretion vested in the Commission by necessary implication also resides in the court. We think that plaintiff's claim for exemption has been made and diligently prosecuted without delay in good faith and that in view of the fact that no price schedule has been established the plaintiff was in this case entitled to be exempted from the 19½ per cent exaction of the statute until the final action of the Supreme Court denying rehearing on its ruling on certiorari on December 4, 1939. As to the taxes laid and attempted to be collected by defendant under the 19½ per centum provision of the Act prior to said date of December 4, 1939, therefore, the plaintiff is entitled to the injunction prayed for. It is decreed that such taxes up to that time are null and void and their assertion or collection is enjoined.

But from and after said date plaintiff has ceased to be exempt by reason of its application for exemption and litigation in support of such claim. Its bill in equity herein seeking to enjoin defendant from assessing and collecting the amount of 19½ per centum of the sale price of its coals from and after December 4, 1939, is without equity and is dismissed.

But notwithstanding such dismissal, the restraining order heretofore entered herein shall remain operative to prevent assertion or collection of such taxes by defendant for the period of thirty days from the entry hereof to enable the plaintiff to appeal to the Supreme Court. If the plaintiff shall perfect such appeal in said court within said period, the restraining order shall remain in force and shall operate to stay our decree until final disposition of the appeal in

the Supreme Court; otherwise it shall cease to be operative and shall stand revoked at the end of said thirty day period.

Now that seems to us sufficient basis for the clerk to enter a decree in conformity with our decision.

Filed Feb. 16, 1940.

DISTRICT COURT OF THE UNITED STATES OF AMERICA, EASTERN DISTRICT OF ARKANSAS, WESTERN DIVISION

I, Grady Miller, Clerk of the District Court of the United States for the Eastern District of Arkansas, in the Eighth Circuit, hereby certify that the foregoing writing annexed to this certificate is a true, correct, and compared copy of the original remaining of record in my office, at Little Rock, Arkansas.

In Witness Whereof, I have hereunto set my hand and the seal of said Court, this 18th day of March, in the year of our Lord, one thousand nine hundred and Forty, and of the Independence of the United States of America, the one hundred and Sixty-fourth.

GRADY MILLER,
Clerk.

[SEAL.]

By SUE JONES,
Deputy Clerk.